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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1931.

WILLIAM J. STRATTON, as Secretary of State of the State of Illinois,
Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation,
Appellee.

No. 178.

Appeal from Statutory District Court of the United States for the Southern District of Illinois, Southern Division.

APPELLEE'S MEMORANDA OF AUTHORITY ON EQUITY JURISDICTION.

J. R. TURNEY,
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Counsel for Appellee.

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H. L. BROWNING,
Of Counsel for Appellee.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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APPELLEE'S MEMORANDA OF AUTHORITY ON EQUITY JURISDICTION.

Recovery of Taxes Paid Under Duress.

Where a person, not lawfully liable to pay a tax, is peremptorily called on to pay, under threat of immediate execution of a warrant, and he can save himself or his property in no other way; then by paying the illegal demand, giving notice that he pays it under protest, such payment will be considered under duress and he may thereafter

maintain an action in assumpsit against the taxing body (the State excepted) to recover the tax so paid.

Harvey & Boyd v. President & Board of Trustees of Town of Olney, 42 Ill. 336;
Conkling v. City of Springfield, 132 Ill. 420;
Bradford v. City of Chicago, 25 Ill. 349;
Falls v. City of Cairo, 58 Ill. 403.

To render a payment compulsory, such pressure must be brought to bear upon the person paying as to interfere with his free enjoyment of his rights of person or property—the compulsion must furnish the motive for the payment sought to be avoided.

School of Domestic Arts v. Harding, 331 Ill. 330, Op. 332;
Illinois Glass Co. v. Chicago Telephone Co., 234 Ill. 535;
Yates v. Royal Insurance Co., 200 Ill. 202;
Stover v. Mitchell, 45 Ill. 213;
Elston v. City of Chicago, 40 Ill. 514.

Tax money voluntarily paid under an unconstitutional state statute cannot be recovered; and in this connection fear and belief that unless such payment is made the payor will be subjected to the penalties provided by the unconstitutional statute does not amount to duress.

Richardson Lubricating Co. v. Kenney, 337 Ill. 123.

A payment made to prevent a sale of real estate for an illegal tax is not under compulsion, but must be regarded as voluntary.

Otis v. People ex rel. County Treasurer, 196 Ill. 542, at 547;
Stover v. Mitchell, 45 Ill. 213.

Where an officer of the taxing municipality still has in his possession the tax money so collected by compulsion, then the taxpayer may maintain a suit against such officer in his official capacity to recover.

Yates, Insurance Supt., v. Royal Ins. Co., 200 Ill. 202;
Swanston v. Ijams, County Treasurer, 63 Ill. 165.

Where an illegal tax is paid under protest, but without compulsion or duress, such payment is voluntary and the tax cannot be recovered.

School of Domestic Arts v. Harding, 331 Ill. 330, Op. 332;
Davis v. Board of Education, 323 Ill. 281;
Conkling v. City of Springfield, 132 Ill. 420.

We find no Illinois authority holding that where an illegal state tax is paid under duress (not involving a trespass), with protest, and thereafter the state officer receiving the same pays the money into the state treasury (the money could be recovered from any other taxing

body), that then such officer becomes personally liable for the tax.

> "A county which has collected general taxes for itself and the state, cities, towns, villages, school districts and the like, is not liable for those taxes which it has paid over to the public corporations or authorities which levied them (Commonwealth of Kentucky to use of Devoe v. Boske, 99 S. W. [Ky.] 316; Price v. Lancaster County, 18 Neb. 199; Meacham v. Town of Newport, 70 Vt. 264)."
>
> Hettler Lumber Co. v. Cook County, 336 Ill. 645, Op. 650.

The Statute.

There is no Illinois statute giving appellee, after payment of the tax under protest and/or under duress, the right, as a matter of law, to an injunction to restrain the Secretary of State from paying the money into the state treasury until the legality of the tax has been determined.

Section 2a of "An act in relation to the payment of the public money of the state into the state treasury," in force July 13, 1921 (Laws 1921, p. 586), follows:

> "Sec. 2a. It shall be the duty of every officer, board, commission, commissioner, department, institute, arm or agency brought within the provisions of this act by section 1 hereof to hold for thirty days all moneys received for or on behalf of the state under protest and on the expiration of such period to deposit the same

with the State Treasurer unless the party making such payment shall, within such period, file a bill in chancery and secure a temporary injunction restraining the making of such deposit, in which case such payment shall be held until the final order or decree of the Court."

Smith-Hurd Rev. Stat., Chap. 127, Par. 172;
Cahill's Ill. Stat., Chap. 127 B, Par. 35.

The action of the Secretary of State in so paying the money into the state treasury would be an official ministerial act performed specifically in his line of duty, exactly as prescribed by the mandate of the statute, for violation of which he would be subject to a fine of not more than $1,000 and imprisonment for not more than two years, or both.

See Sec. 2B of Statute;
Smith-Hurd's Stat., Ch. 127, Par. 173;
Cahill's Stat., Ch. 127 B, Par. 36.

Public officers are not to be held personally liable for damages resulting from ministerial official acts performed by them in line of their specific duties, in exact accordance with the requirements of a statute.

Spalding v. Vilas, 161 U. S. 483, 40 L. ed. 780, 16 Sup. Ct. Rep. 631;
Conner v. Long, 104 U. S. 228, 26 L. ed. 723.

We find no holding by Illinois courts that the foregoing statute entitles taxpayers paying under protest to tempo-

rary injunction as a matter of right, or that application for such injunction is the exclusive remedy.

We understand that in practice the Attorney-General has always assented to the issuance of temporary injunctions in such cases, and the Circuit Court of Sangamon County has always heretofore acquiesced therein. If the procedure suggested by the statute is the sole remedy, then should the Attorney-General change his disposition and contest applications for temporary injunction, or if the Court, on its own motion, should refuse to allow such application, then, after the moneys were paid into the state treasury and commingled with the state funds, the taxpayer would be without any possible remedy.

Notwithstanding the fact that an unconstitutional statute confers no right, imposes no duty and affords no protection (Highway Commissioners v. City of Bloomington, 253 Ill. 164, Op. 176), still if appellee had paid the tax under protest and duress (there being no actual trespass) and had been unable to secure an injunction restraining payment into the state treasury; and if thereafter, at the expiration of thirty days appellant complied with the foregoing statute, then appellee would be without remedy at law or in equity, either against the State of Illinois or the Secretary of State. Surely, appellee should not be required to refuse to pay the tax, and if the victim of trespass on the part of the Secretary of State in the performance of his duty under the Illinois Corporation Act, then to sue the Secretary of State at law for the damages

sustained. Equity should take jurisdiction to enjoin the threatened application of the coercive provisions of the Illinois statute, as it did in the Air-Way, Cudahy Packing, Ohio Tax, Ludwig, and other cases.

The Supreme Court of the United States has upheld an injunction restraining the collection of Illinois taxes in a suit brought in the United States District Court. The adequacy of plaintiff's remedy at law is discussed in the opinion.

Raymond v. Chicago Union Traction Co., 207 U. S. 20, Op. 39-40.

"A court of equity will exercise jurisdiction to enjoin the collection of a tax where the tax is not authorized by law, where it is assessed upon property not subject to taxation and where the property has been fraudulently assessed at too high a rate. This is the long-established and well-recognized practice in this court."

The People's Gas Light Co. v. Stuckhart, 286 Ill. 164, Op. 176;

Illinois Central R. Co. v. Hodges, 113 Ill. 323, Op. 325;

Kimball v. Merchants' S. L. & T. Co., 89 Ill. 611, Op. 613;

Town of Lebanon v. Ohio & Miss. R. Co., 77 Ill. 539;

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Respectfully submitted,

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